IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELAWARE STATE UNIVERSITY, Respondent Below Appellant, v. DELAWARE STATE UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Charging Party Below Appellee.	)	Civil Action No. 1389-K

MEMORANDUM OPINION

Date Submitted: December 17, 2001
Date Decided: February 26, 2002

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STRINE, Vice Chancellor

Delaware State University ("DSU") has yet again appealed an order of the State of Delaware Public Employee Relations Board (the "PERB" or the "Board") in this aged dispute. At this stage, the only issue before the court is whether the PERB erred in finding that DSU committed an unfair labor practice ("ULP") under the Public Employment Relations Act ("PERA").[1] Specifically, DSU challenges the Board's conclusion that it violated § 1307(a)(5) of PERA by refusing to grant the American Association of University Professors (the "AAUP") access to certain files relating to DSU's administration of its Merit Compensation Program. Section 1307(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively in good faith.

This dispute arose in connection with a grievance filed by a senior official of the AAUP, who alleged that DSU administrators retaliated against her for her union activity by refusing to award her merit compensation *for the 1993-94 academic year*. Pursuant to Article 14.4.6 of the applicable collective bargaining agreement ("CBA" or "Agreement"), the AAUP requested documents submitted by, and on behalf of, all bargaining unit members who received merit pay for that year — including the merit recommendations submitted by their supervisors. Article 14.4.6 specifically

[1] DEL. CODE ANN., tit. 19, ch. 13 (2002).

provided the AAUP with the right to receive information necessary to investigate and process a grievance within seven days of its request.

DSU and the AAUP were unable to reach agreement over the AAUP's discovery request. Instead of deploying the contract's dispute resolution process, the AAUP filed an unfair labor practice charge against DSU pursuant to § 1307(a)(5) for refusing to provide the requested information. Over a year later — and less than a week before the scheduled arbitration hearing on the grievance — the AAUP asked the arbitrator for a subpoena to compel the production of the requested documents, plus similar documents for the 1994-95 academic year. Before the hearing, the arbitrator granted the AAUP access to the 1993-94 documents, and DSU fully complied with the subpoena. The AAUP went forward with the arbitration, which it lost on the merits after two days of testimony.

More than a year after the AAUP received the information and two years after the AAUP filed its ULP charge, the PERB Hearing Officer issued the PERB's initial decision addressing the union's allegation that DSU violated § 1307(a)(5). In response to the AAUP's claim that DSU violated its duty to bargain collectively in good faith by refusing to comply with the union's information request, DSU asserted that the underlying grievance was unsubstantiated and that production would violate the confidentiality and

thus the "integrity" of the Merit Compensation Program.[2] Most importantly, DSU asserted the defense that the PERB ought to have deferred to the dispute resolution process established by the CBA.

The PERB rejected all of DSU's arguments. They ruled that deferral to the contractual arbitration process was unnecessary, and that DSU's failure to produce the Merit Compensation Program materials violated § 1307(a)(5) of PERA. DSU appealed that decision to this court.

On appeal, this court found that the Board erred as a matter of law when it determined that it should not defer to the grievance and arbitration procedures established in Article 14.4.6 — a provision that specifically addresses requests for information in the context of grievances. More specifically, the court held that the Board erred by failing to apply the standard set forth by the Delaware Supreme Court in *City of Wilmington v. Wilmington Firefighters Local 1590*,[3] under which deference to contractual dispute resolution provisions is generally appropriate even when such provisions address statutorily protected rights. Nor did the PERB explain why that standard ought not apply to this dispute. Although the court's opinion stated a variety of reasons why deference seemed to be the optimal

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[2] *Delaware State Univ. v. Delaware State Univ. Chapter of the Am. Ass'n of Univ. Professors ("DSU I")*, 2000 WL 33521111 (Del. Ch. May 9, 2000 corrected May 16, 2000).

[3] 385 A.2d 720 (Del. 1978).

course under the PERA under the specific factual circumstances presented in this case, the court did not dismiss the ULP charge against DSU, but instead remanded to permit the PERB to reconsider the question in view of the court's opinion. On July 20, 2001, the PERB issued its latest decision, sticking by its initial ruling. Thereafter, DSU filed this appeal, again seeking reversal.

In this opinion, I conclude that in accordance with the *City of Wilmington* case, the PERB again erred as a matter of law. When a collective bargaining agreement includes a specific provision addressing a union's entitlement to information relevant to the investigation and processing of a grievance, that specific contractual provision should be deployed in the first instance by the union. Although there may be circumstances when the instrumental right to information recognized under § 1307(a)(5) should be vindicated by the PERB even when such a contractual provision exists, in the normal course the PERB should defer to the resolution of information disputes by the contractual dispute resolution process. Such a deferral rule best implements the PERA's mandate that the parties themselves negotiate dispute resolution mechanisms.

As important, a deferral rule of this kind fully vindicates the informational needs of unions, but in a more efficient and timely manner.

Given the record in this case and the reality of current arbitration procedures, it seems likely that the resolution of informational (*i.e.*, quasi-discovery) disputes will more timely occur through the contractual rather than the statutory process. Furthermore, this deferral rule allows parties to structure resolution of such disputes so that the arbitrator who might finally hear the underlying grievance can first determine whether information is relevant — and, if so, whether other considerations (*i.e.*, confidentiality) require that safeguards be put in place to protect an employer's legitimate concerns. Because the right to information under § 1307(a)(5) is an instrumental one that provides a union access to information under a standard identical to that applied in discovery disputes, a ruling by an arbitrator under a contract regarding the employer's duty of production should ordinarily be sufficient to satisfactorily address any improper denial of access by an employer.

Indeed, in this case, the contractual arbitration process resulted in the production of the information the AAUP sought well before the PERB acted in this matter. That is, the AAUP's access to information was fully vindicated by the arbitrator, and would have likely been vindicated much earlier had the AAUP availed itself of its contractual right to grieve the information dispute or if it had sought a protection order from the arbitrator sooner. Given that the underlying grievance was resolved long before the

PERB acted and that the AAUP's informational rights had been secured by the arbitrator, there was little sense in burdening the DSU with further proceedings before the PERB. The PERB should have stayed its hand.

For these and other reasons more fully articulated in this opinion,[4] I therefore reverse the PERB's decision and dismiss the ULP charge against DSU.[5]

I. The Standard Of Review

Conclusions of law made by the PERB are reviewed by this court on a *de novo* basis.[6] In undertaking such a review, this court bears in mind the PERB's expertise in labor law and the relevance of that expertise in formulating policy under statutes like PERA.[7] Nonetheless, in the end, the court remains obligated to conduct a plenary review of a PERB decision

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[4] My decision is also supported by the reasoning of my earlier decision in this matter. *DSU I*, 2000 WL 33521111.

[5] In an earlier decision in this case, I expressed great regret over continuing what seemed to be a pointless, if not moot, dispute. *Id.*, at *2 n.2. Labor relations law is supposed to be intensely practical and to make real-world sense. This dispute seems almost entirely academic in the colloquial sense, which is, I suppose, fitting given the parties involved. Nonetheless, the ongoing use of public and union resources for the purpose of perpetuating this debate is of dubious utility.

[6] *Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*, 1996 Del. Ch. LEXIS 27, at *11 (Del. Ch.), *aff'd*, 685 A.2d 361 (Del. 1996).

[7] *Fraternal Order of Police Lodge No. 15 v. City of Dover*, 1999 Del. Ch. LEXIS 224, at *7 (Del. Ch.) (internal quotations and citations omitted).

when the issue is the proper construction of statutory law and its application to undisputed facts.[8]

By contrast, all factual conclusions by the Board that are supported by substantial evidence in the record must be accepted as correct.[9] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] In this case, the PERB based all of its decisions on, and drew factual inferences from, a stipulated paper record. As was noted in the court's earlier opinion, the scope of review regarding the question of whether the PERB acted properly in refusing to defer to the contractual dispute resolution mechanism regarding information is somewhat more difficult to state. The question of which standard the PERB must apply when deciding whether or not to defer to a contract provision is a question of law subject to *de novo* review.[11] But the PERB's application of the appropriate legal standard in a particular instance is reviewed by this

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[8] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999); *see also id.* at 382 ("A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.") & n.8.

[9] 29 Del. C. § 10142(d).

[10] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

[11] *Colonial Sch. Dist.*, 1996 Del. Ch. LEXIS 27, at *11; *see DiPasquale*, 735 A.2d at 380-83; *cf. City of Wilmington*, 385 A.2d 720 (determining standard for pre-arbitral deferral under former tit. 19, ch. 13).

court solely for abuse of discretion.[12] In this case, the PERB purported to articulate a deferral standard that carves out any informational disputes between unions and employers, regardless of the presence of a contractual provision specifically governing such disputes. In this respect, because the PERB's ruling involves an interpretation of the meaning of PERA, its ruling is subject to *de novo* review.

II. Factual Background

A. The 1995 Grievance Underlying This Appeal

Having addressed this case before, the court draws heavily on its previous recitation of the facts relevant to whether the PERB properly declined to defer to the contractual provisions governing the production of information related to grievances, and whether the Board correctly concluded that DSU violated § 1307(a)(5).

1. The Conflict Between DSU And The AAUP Over Requests For Information

This litigation involves the second dust-up between DSU and the AAUP over whether and to what extent DSU must disclose information concerning the Merit Compensation Program's administration. Both fights arose in connection with grievances filed by the AAUP on behalf of

[12] *See, e.g., NLRB v. Am. Nat'l Can Co.*, 924 F.2d 518, 522 (4th Cir. 1991) (an NLRB decision concerning deferral to arbitration "is to be affirmed unless found to be an abuse of discretion") (citation omitted).

Professor Jane Buck, a now-retired DSU psychology professor who served the AAUP in numerous leadership positions. Buck first grieved her merit pay in the spring of 1992 (the "1992 Grievance"), when she contested the amount of the award she received for the 1990-91 academic year. The grievance underlying the present disagreement concerns Buck's 1995 challenge of DSU's failure to award her any merit pay for 1993-94 (the "1995 Grievance" or the "Grievance"). In both grievances, Buck complained that DSU improperly used the Program to penalize her for her union activity.

In relation to both grievances, DSU and the AAUP dueled over the AAUP's request for information it claimed was necessary to evaluate Buck's grievances. But whereas the discovery battle arising out of the 1992 Grievance turned solely on whether DSU was *contractually* obligated to comply with the AAUP's request for file access, the present dispute also turns on DSU's *statutory* duty to grant such access under PERA, which was enacted in 1994. Buck lost the 1992 Grievance on the merits, but the arbitrator upheld the AAUP's contractual right to review the application files of merit award recipients under Article 14.4.6 of the Agreement.

2. The Relevant CBA Provisions

In its decisions, the PERB has largely treated the informational dispute as implicating only the AAUP's statutory right to information pursuant to PERA § 1307(a)(5). But the court believes that several provisions of the CBA are critical to the fair determination of this case.

The most important of the provisions is Article 14.4.6. That article requires DSU to share with a grievant or the union "[a]ny information pertaining to the grievance in the official file in the possession of [DSU] needed by the grievant or the Association on behalf of the grievant to investigate and process a grievance" within seven working days of the request.

In its previous opinion, the court also pointed out that several contractual provisions gave color to DSU's argument that the AAUP's information request implicated legitimate confidentiality concerns. In particular, the court cited to provisions that suggested that some of the information sought by the AAUP (*i.e.*, supervisor recommendations) was sensitive, and that unrestricted disclosure of those materials could in good faith be argued to compromise the annual Merit Compensation Program (the "Program"), which is designed to recognize faculty who demonstrate outstanding performance in teaching or assigned duties, research and

writing, or service to DSU or the community.[13] Provisions of the CBA also seemed to give support to DSU's concerns that an uncontrolled and overly broad production could intrude on the privacy expectations of bargaining unit members other than Buck.[14]

3. The 1995 Grievance And The Battle Over The Union's Entitlement to Information Under PERA

The current litigation stems from the 1995 Grievance, which the AAUP filed on April 24, 1995. The same day the AAUP filed the 1995 Grievance, it submitted a written request for information *pursuant to Article 14.4.6, not PERA*. The AAUP sought "access to the merit applications and supporting documentation of all unit members who were awarded merit this year" and "copies of all the recommendations for merit forwarded by each of the Chairs and each of the Deans."[15] The AAUP did not specifically state that the request was in connection to the 1995 Grievance.

By letter dated May 2, 1995, DSU Contract Administrator James Mims refused to comply with the request, stating that "it [was] evident that the information being requested [was] not needed to investigate and process a grievance, but instead [was] being requested in order to search for a

[13] *See DSU I*, 2000 WL 33521111, at *7.

[14] *See id.* at *17.

[15] DSU App. 7/30/00 ("DSU II") Ex. 4.

grievance."[16] He asked the AAUP to submit a "proper request."[17] The grievance process was then suspended during the summer.

By the end of August, Buck had taken over the position of AAUP president and began acting as her own union advocate. Eschewing the option of grieving DSU's failure to provide the requested information by May 3, 1995 — *i.e.*, the seven working days contemplated by Article 14.4.6 — Buck instead initiated a round of testy correspondence between herself and Mims. To label the tenor of the correspondence as adolescent is to understate its jejuneness.

The essence of the positions of the AAUP and DSU can be summarized as follows. For its part, DSU contended that the union's request should be made under Article 14.4.6 and that DSU only had to provide information relevant and necessary to investigate and process the 1995 Grievance. It further argued that the union had failed to demonstrate its entitlement under that standard.

By contrast, the AAUP argued that it had a right to the requested information under both the CBA and § 1307(a)(5) of PERA. In this regard, the AAUP contended that the information must be produced even if it was

[16] DSU II Ex. 5.

[17] *Id.*

not relevant to the 1995 Grievance, because the union was entitled to information in order to monitor DSU's compliance with the CBA. Notably, Buck's reference to the union's right "to monitor contract compliance"[18] was not tied to any particular compliance monitoring the union wished to perform. *Rather, the only genuine purpose of the request was the original one: to get evidence to support the 1995 Grievance.* To that end, the union finally spelled out why it believed the information it sought was relevant to that purpose.

But even after this explanation by the union, the parties still could not reach accord. Instead of grieving the issue and seeking to have it consolidated with the 1995 Grievance for processing, the AAUP filed a ULP charge with the PERB on October 5, 1995.

4. The AAUP Loses 1995 Grievance After Receiving The Requested Information; Over A Year After The Information Was Produced, The PERB Finds That DSU Committed An Unfair Labor Practice

In April of 1996, the arbitrator chosen by the parties to hear the 1995 Grievance denied the AAUP's request for a stay of the arbitration proceedings pending the PERB's decision. In June of 1996, the arbitrator scheduled a hearing date for September 26, 1996.

[18] *Id.* Ex. 6, at 2.

The union waited until September 18, 1996 to obtain from the arbitrator a *subpoena duces tecum* requiring production of evidence from DSU.[19] The subpoena commanded DSU to produce the merit applications for the academic years 1993-94 *and 1994-95* in addition to supporting documentation, recommendations by department chairs and deans, DSU's announcements of the criteria for merit compensation, and copies of directives establishing the Merit Compensation Program's procedures for both academic years.

On September 20, 1996, DSU gave the AAUP copies of the program criteria and DSU's directives concerning those criteria. But, DSU otherwise moved to quash the subpoena because, among other reasons, the requested materials were confidential and were being sought to search for an otherwise unsubstantiated grievance. On September 23, the arbitrator granted DSU's motion to quash as to the AAUP's expanded request for information from 1994-95 but otherwise denied it, and on September 25, DSU gave AAUP access to the applications, the supporting documentation, and the recommendations for 1993-94.

[19] The AAUP waited until September 18 to seek the subpoena; the union could have done so in April of 1996, when the arbitrator refused to stay the proceedings, or in June of 1996, when a hearing date was set.

After evidentiary hearings conducted on September 26 and December 3, 1996, the arbitrator issued a decision on March 5, 1997 denying the 1995 Grievance. In his decision, the arbitrator compared Buck's application with those of other faculty and considered the DSU officials' analysis of those applications in light of the contract criteria.

DSU fared less well before the PERB, however. On November 18, 1997 — over two years after the ULP charge was filed and over a year after DSU had produced the information at issue — the PERB Hearing Officer assigned to the case concluded that DSU's denial of the AAUP's written request for access to the 1993-94 applications, supporting documentation, and recommendations constituted a violation of PERA § 1307(a)(5). On February 5, 1998, the PERB affirmed the Hearing Officer's decision in an opinion that relied heavily on the Hearing Officer's analysis. The DSU then appealed that decision to this court.

III. The Prior Proceedings Before This Court

In a fully articulated decision, this court held that the PERB had erred in failing to apply the deferral standard articulated by the Delaware Supreme Court in the *City of Wilmington* case. In *City of Wilmington*, the Supreme Court adopted a rule of law akin to that used by the National Labor Relations Board ("NLRB") under the National Labor Relations Act

("NLRA").[20] The "pre-arbitral deferral policy" the Supreme Court embraced was one under which the state entity entrusted with enforcing a labor statute should "'refrain from exercising jurisdiction in respect of disputed conduct arguably *both* an unfair labor practice and a contract violation when . . . the parties have voluntarily established by contract a binding settlement procedure.'"[21] The reason for deferring "to the contractually agreed-upon arbitration procedures when the issue is a refusal-to-bargain" is to require parties "'"to honor their contractual obligations rather than, by casting [a] dispute in statutory terms, to ignore their agreed-upon procedures."'"[22] The reasoning of City of Wilmington was based on the reality that "collective bargaining agreements often define statutorily protected rights more specifically and that particular actions may breach both the contract and the relevant statute."[23]

The *City of Wilmington* case was decided under PERA's predecessor statute. Therein, the Delaware Supreme Court held that "contractually agreed-upon arbitration procedures" should generally be given deference

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[20] 385 A.2d 720.

[21] *City of Wilmington*, 385 A.2d at 723 (quoting *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16 (1974)) (emphasis added).

[22] *Id.* (quoting *Arnold*, 417 U.S. at 16 (quoting *Collyer Insulated Wire*, 192 NLRB 837, 842-43 (1971))).

[23] *DSU I*, 2000 WL 33521111, at *11.

"when the issue is a refusal-to-bargain."[24] But, as the Court further explained, the statutory decisionmaker (at that time this court, and now the PERB) may "consider an application for additional relief on a showing that either: (1) the dispute has not been resolved or submitted to arbitration with reasonable promptness, or (2) the arbitration procedures have been unfair or have rendered a result repugnant to the Act."[25]

In my previous opinion, I noted that Article 14.4.6 explicitly addressed information requests in the context of grievances, and that Article 14 of the CBA established the grievance and arbitral processes for handling violations of the CBA, including Article 14.4.6:

> *Indeed, the dispute in this case arose as a result of an information request originally made by the AAUP "[u]nder the terms of Article 14.4.6,"* not PERA. Despite the union's unsubstantiated claim of a broader purpose, the only evident reason for the information request was to help the AAUP prosecute the 1995 Grievance.[26]

I noted that despite these factors, the PERB did not discuss the basic standard set forth in *City of Wilmington*, explain the need for "additional relief"[27] against DSU based on an application of that standard, or justify the need for an exception to that standard. By failing to do so, I held that the

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[24] *Id.*, 385 A.2d at 723-24 (citing *Collyer*, 192 NLRB 837).

[25] *City of Wilmington*, 385 A.2d at 723-24 (quoting *Collyer*, 192 NLRB at 837).

[26] *DSU I*, 2000 WL 33521111, at * 11 (citing DSU App. II Ex. 4).

[27] *City of Wilmington*, 385 A.2d at 723.

PERB erred as a matter of law. From there, I noted several factors bearing on the question of whether deferral was appropriate in this case, almost all of which leaned in favor of deferral.[28]

I also observed, however, that the NLRB's practice under the NLRA generally cut against deferral in right to information cases.[29] The NLRB's views were heavily influenced by a decision of the United States Supreme Court in *NLRB v. Acme Industrial Co.*,[30] in which the Court rejected the employer's contention that the NLRB must wait for an arbitrator to determine the relevance of the requested information before it could enforce the union's statutory rights to information under the NLRA. The *Acme* Court was unpersuaded that the "arbitrator's greater institutional competency" required deferral, and approved of the Board acting only "upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."[31] Rather than "threaten[ing] the power which the parties have given the arbitrator to make binding interpretations of the labor agreement[,]" the

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[28] *DSU I*, 2000 WL 33521111, at *15.

[29] *Id.* at *12.

[30] 385 U.S. 432 (1967).

[31] *Acme*, 385 U.S. at 436-37 (citation omitted).

Court found that the NLRB's assertion of jurisdiction "was in aid of the arbitral process."[32]

Although *Acme* was venerable authority, I noted that the Delaware courts had yet to embrace it as the law of our state.[33] I then went on to note that *Acme* appeared to adopt a dated view of the world. In particular, the approach failed to consider how far arbitration practice has evolved, particularly with respect to its easier access to discovery.[34] *Acme*, the prior opinion pointed out, also seemed to be premised on the notion that it was markedly more efficient for a union to seek information through a ULP proceeding than under a contractual grievance procedure, and to discount any efficiencies to be gained by entrusting the same arbitrator who might have to decide an underlying grievance with the power to resolve what in reality was a discovery dispute in that same case.[35] As important, I noted that even under the NLRA, it was unclear that deferral was inappropriate in a case like this one, when the CBA contains a provision that explicitly addresses the production of grievance-relevant information.[36]

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[32] *Acme*, 385 U.S. at 438. *See also id.* (because "[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims[,]" the arbitration system would be "woefully overburdened" if unions were forced to take grievances "all the way through to arbitration without providing [unions] the opportunity to evaluate the merits of the claim").

[33] *DSU I*, 2000 WL 33521111, at *13.

[34] *Id.* at *11 n.55.

[35] *Id.* at. *12-*13, *15.

[36] *Id.*

Because the PERB had not considered the *City of Wilmington* standard at all, or several other pertinent issues, I held as follows:

> I conclude that the interests of the parties and the public are best served by remanding this case to the PERB. If the PERB finds it appropriate to adopt the federal right-to-information exception and to take a different approach than *City of Wilmington* in informational cases, it should provide a clear statement of its recommended deferral policy, and explain why that standard best advances the goals of PERA.[37]
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> In performing that task, the PERB must take pains not only to safeguard the ability of certified representatives to advocate on behalf of public employees but also to avoid unfairly whipsawing public employers with duplicative statutory proceedings on top of bargained-for dispute resolution mechanisms. A central purpose of PERA is to facilitate the speedy, peaceful, and inexpensive resolution of labor issues. Only a careful balancing of the competing values at stake will advance these goals of Delaware public employment relations laws.

IV. The PERB's Remand Decision

On remand, the PERB adhered to its prior position. Its reasoning can be divided into the general and the case-specific. I start with the general.

In broad terms, the PERB's decision largely rested on the idea that a union's right to information necessary to investigate a grievance is so fundamental that informational cases should never be the subject of

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[37] *Id.* at 13. On remand, the PERB did not believe that federal *post*-arbitral federal deference standards were pertinent here. Without entering that thicket, I note that the reasoning of those cases supports deference here, or phrased differently, a requirement that the AAUP utilize the dispute resolution process available to enforce Article 14.4.6. *See, e.g., NLRB v. The Motor Convoy, Inc.*, 673 F.2d 734, 735 (4th Cir. 1982).

deferral.[38] In this regard, the PERB takes the view that a union should not be forced to pursue a grievance to arbitration simply because it has yet to receive the underlying information necessary to determine whether to prosecute the grievance.[39] Instead, the union should have the right to receive the information first and to grieve later.[40]

The PERB also takes the view that an arbitrator's decision to require an employer like DSU to turn over the information does not fully vindicate the union's § 1307(a)(5) rights.[41] Instead, the PERB feels that there must be some independent determination of whether the employer's refusal was unlawful, even if the arbitrator's order of production (in the face of an employer's refusal) can be deemed a decision that the employer's non-production was improper.[42] Finally, the PERB's decision rests on its apparent belief that it is markedly less expensive and time consuming for parties to contest issues before the PERB than before an arbitrator.[43] The PERB also gives little weight to any efficiencies that could result from

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[38] *See Delaware State Univ. Chapter, Am. Ass'n of Univ. Professors v. Delaware State Univ.*, ULP 95-10-159, Murray-Shepard, Hearing Officer (PERB Apr. 27, 2001) ("Hearing Officer Dec.") at 8-9; *Delaware State Univ. Chapter, Am. Ass'n of Univ. Professors v. Delaware State Univ.*, ULP 95-10-159 (PERB July 20, 2001) ("PERB Dec.") at 4.

[39] *See* Hearing Officer Dec. at 13-14; PERB Dec. at 4.

[40] *See id.*

[41] *See* Hearing Officer Dec. at 16-18; PERB Dec. at 5.

[42] *See* Hearing Officer Dec. at 16-18.

[43] *See* Hearing Officer Dec. at 15; PERB Dec. at 4-5.

having the arbitrator who must decide whether a contractual grievance should be sustained also determine what information must be provided to the union as a matter of discovery.

In terms of this specific case, the PERB bootstrapped the AAUP's failure to grieve the issue of whether DSU's refusal to provide the information it requested into a reason for ruling against DSU. That is, the AAUP's failure to follow the agreed-upon contractual procedures came back to haunt not it, but DSU. Because the arbitrator's decision requiring DSU to produce the information the union sought did not result from a grievance filed under Article 14.4.6, the PERB saw no reason to defer to the arbitrator's resolution of the issue.[44] Likewise, the PERB ignored the fact that the AAUP's request for information was filed in connection with an already-filed grievance and that there was no plausible evidence that the information was sought for any other purpose. Instead, the PERB referred to some generalized need for the AAUP to "police" the enforcement of the CBA, a need not supported by the record and at odds with the fact that the union was seeking the information for the specific purpose of aiding in the prosecution of a pending grievance.[45]

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[44] Hearing Officer Dec. at 17.

[45] Hearing Officer Dec. at 16. The Hearing Officer also found that if the AAUP had received the documents it sought earlier, it was "equally likely" to have dropped Buck's grievance. In this

Notably, the PERB also ignored this court's admonition that if the PERB sought to hold DSU responsible for a ULP, it must first revisit its previous determination that DSU had no good faith objection to producing some of the information on the grounds of confidentiality.[46] As noted in the previous decision, the requested information included merit recommendations for bargaining unit members other than the grievant Buck and additional information that might be sensitive, and, at least subject to production only under a confidentiality order limiting the union's use of it for specific purposes.[47] To the extent that the PERB wished to give no weight to the arbitrator's decision, it could not avoid making the type of balancing decisions required of a court or arbitrator in resolving a discovery dispute. On remand, the PERB ignored these instructions, and again blithely assumed that the information could not be of any sensitivity.

In the pages that follow, I explain why I conclude that the PERB's refusal to defer was erroneous in light of the undisputed facts of this case.

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particular case, this reasoning is unsustainable because nothing in the record indicates that Buck — as union president — would have dropped her own claim.

[46] *DSU I*, 2000 WL 33521111, at *16.

[47] *Id.* at *17.

V. The PERB Erred By Failing To Defer

As an analytical building block, it is important to understand the overlapping relationship between § 1307(a)(5) of PERA and Article § 14.4.6 of the CBA. Section 1307(a)(5) provides that "[i]t is an unfair labor practice for a public employer or its designated representative to . . . [r]efuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject."[48]

In my previous decision, I noted this section of PERA is modeled on provisions in other Delaware labor statutes. Such provisions are commonly interpreted to require employers to furnish information necessary for the processing of grievances.[49] Similarly, federal courts have long held that NLRA § 8(a)(5) requires the production of information necessary to process grievances.[50] For that reason, I held that that the duty to bargain in good faith under PERA § 1307(a)(5) encompassed the obligation to provide non-privileged information relevant to contractual grievances.[51]

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[48] 19 Del. C. § 1307(a)(5).

[49] *See, e.g., Colonial School District*, 1996 Del. Ch. LEXIS 27, at *23 (citation omitted).

[50] *See, e.g., Acme Indus. Co.*, 385 U.S. 432 at 435-36.

[51] *DSU I*, 2000 WL 33521111, at *10.

But, I also noted that the statutory informational rights of unions are not unlimited. Instead, those rights are governed by the same type of constraints as apply in the context of pre-trial or pre-arbitral discovery. Thus, the union's rights do not allow it an untrammeled right to receive information; instead, a union's right to information is cabined by a discovery-type relevancy standard, and must be balanced against the employer's legitimate interests in protecting confidential and proprietary information, and in not suffering undue burden from overly broad document demands.[52]

In this case, the statutory standard applicable under § 1307(a)(5) is no different from that which an arbitrator would be required to apply under Article 14.4.6 of the CBA. What is materially different is that the CBA provides an additional burden on DSU that the statute does not: it requires the DSU to produce the requested information within seven working days. That is, through the collective bargaining process, the AAUP was able to bargain for informational access that is arguably superior than the statute provides.

It is therefore worth highlighting the obvious: this case does not involve a request for deferral simply because a union could have gained

[52] *Id.* at *17.

access to information in the routine process of discovery in arbitration. It can be argued that the availability of discovery in arbitration counsels for a deference rule that requires a union seeking evidence to support a grievance to use that arbitration discovery process for that purpose. Such a rule could be said to comport with § 1307(a)(5) because it channels discovery fights into the contracting parties' own chosen dispute resolution process. But, arguments to the contrary can also be made.

What is important is that this case does not involve so broad a claim for deference. *Instead, DSU is arguing that the PERB should defer when a collective bargaining agreement specifically addresses the right of a union to receive information relevant to the prosecution of a grievance, and require the union to avail itself of the very contract provision its own bargaining efforts procured.* It is that more targeted claim the PERB was asked to address — a claim that finds strong support in PERA's own words. Delaware public policy strongly favors the use of contractual dispute resolution procedures to resolve disputes between public employers and the bargaining representatives of their employees.[53] Indeed, under PERA:

> [t]he public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their

[53] *City of Wilmington*, 385 A.2d at 724-25; *City of Wilmington v. Fraternal Order of Police*, 510 A.2d 1028, 1029 (Del. 1986).

> collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.[54]

By utilizing this statutory mandate, DSU and the AAUP forged their own approach to information production, one which gave the union speedy access to information relevant to grievance prosecution. Under the terms of Article 14.4.6, the AAUP was within its rights to grieve DSU's failure to produce the requested information as early as May, 1995. This contractual tool gave it a great deal of flexibility. The AAUP could have utilized it. In combination, it could have asked that the information dispute and underlying grievance by heard by the same arbitrator.[55] This alternative seems no more burdensome or time consuming than the prosecution of a ULP before the PERB.[56] Moreover, this alternative best implements the PERA by requiring the parties to utilize their agreed-upon dispute resolution mechanisms before

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[54] 19 Del. C. §1313(c).

[55] The AAUP says this would have required DSU's consent. Yet, the AAUP has articulated no reason why DSU would have objected. In any event, there seems to be no basis to believe that it is less expensive and time-consuming to prosecute the information dispute before the PERB, rather than the arbitral process, even if the underlying grievance must be pressed separately. Under the approach adopted herein, an inefficient dual track more likely will not result, especially because one can assume that arbitrators will generally try to implement a rational approach to case management that will avoid waste. Under the PERB's approach, a dual track will invariably be available.

[56] One of the reasons I remanded this case previously was to permit the PERB to apply its Delaware-specific knowledge of the ULP and labor arbitration process to the issue of deferral. This it did not do. For example, the PERB's ULP process involves two major steps — an evidentiary hearing before a hearing officer and an appeal to the PERB. In this case, at the very

going to the PERB. Because the PERA requires parties to bargain over such mechanisms, it undermines this statutory mandate to enable a union to disavow the contractually agreed procedure by jumping directly to the filing of a statutory ULP.

The *City of Wilmington* standard is consistent with this reasoning because it reinforces the importance of the collective bargaining agreement by requiring parties to resolve issues that could disputed either as a ULP, or a contractual violation under the contract in the first instance. Moreover, that standard is not one that leaves unions helpless in the event that the contractual dispute resolution procedures work some cognizable unfairness. Recall that under *City of Wilmington*, the PERB may "consider an application for additional relief on a showing that either: (1) the dispute has not been resolved . . . with reasonable promptness, or (2) the arbitration procedures have been unfair or have rendered a result repugnant to the Act."[57] On remand, the PERB Hearing Officer's decision noted that the PERB itself has traditionally deferred to an arbitrator's resolution when "(1) there exists a long-standing and well established collective bargaining relationship; (2) the employer is willing to arbitrate a properly filed

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least, that two-step process has taken a generous amount of time. One suspects that parties wishing to arbitrate an issue can do so at least as promptly, and perhaps much more so.

[57] *See City of Wilmington, supra* n. 25.

grievance; and (3) the resolution of the contractual dispute would resolve the underlying issue presented in the unfair labor practice complaint."[58] In this case, all of the PERB's own conditions for deferral were satisfied, yet the PERB still refused to defer.

That this refusal was unwarranted is best illustrated by considering this matter in light of the *City of Wilmington* standard.

> Overall, an application of the general *City of Wilmington* deferral standard to the facts of this case highlights the wisdom of that standard's deference to duly negotiated contract terms except when the request has 'not been resolved with reasonable promptness' or when the arbitration procedures are 'unfair' or produce a result 'repugnant' to PERA.[59]

The "reasonable promptness" standard was fully satisfied here. The arbitrator of the 1995 Grievance resolved this discovery dispute considerably in advance of the PERB. The arbitrator ruled on the AAUP's information request in September of 1996. The PERB reached its ULP decision in February of 1998. Had the AAUP pressed its information request more diligently, the arbitrator would likely have determined the issue even sooner. By the time the PERB issued these decisions, not only had the information request been resolved pursuant to the contractual procedures, but the

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[58] DSU Hearing Officer Dec. at 8.

[59] *DSU I*, 2000 WL 33521111, at *13 (quoting *City of Wilmington*, 385 A.2d at 723).

arbitration of the merits of the 1995 Grievance had also long since taken place.

The AAUP must also bear the delay costs of its own decision to ignore the contractual mechanisms available for obtaining the information necessary to process the 1995 Grievance. Under Article 14.4.6, DSU was required to produce the requested information *within seven working days* of April 24, 1995, after which the union could grieve the issue. "Instead, the AAUP pursued a purely statutory vindication of its claimed entitlement to information relevant to 'monitoring contract compliance,' even though the union clearly sought the information in connection with the 1995 Grievance rather than for more general purposes."[60]

All in all "[the] discovery dispute seems to have been 'resolved with reasonable promptness' by the arbitrator, bearing out the observation that '[a]rbitration is often a catalyst in labor peace because of its speed.'"[61] "In fact, DSU and the AAUP might well have reached some measure of peace on this issue several years ago had the PERB not permitted the AAUP to

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[60] *Id.* at *14.

[61] *Id.* (quoting *United Steelworkers v. Am. Int'l Aluminum Corp.*, 334 F.2d 147, 153 n.11 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965)).

'cast [a contractual] dispute in statutory terms' and to 'ignore [the parties'] agreed-upon procedures.'"[62]

Likewise, the second element of the *City of Wilmington* standard counseled in favor of deference here. There has been no showing that arbitration procedures "have been unfair or have rendered a result repugnant to the Act."[63] At no time has the AAUP argued that the arbitrator's handling of the discovery dispute was procedurally or substantively "unfair" or somehow "repugnant" to PERA. In fact, the arbitrator provided the AAUP with most of the documents it desired to prosecute the 1995 Grievance. The only further relief the AAUP received from the PERB was a ULP finding and an order requiring DSU to tell its employees it had breached the statute.

Therefore, by the time the PERB made its first ULP determination, the arbitrator had long ago settled any live evidentiary dispute. There is no doubt that the PERB is correct to stress the importance of a union's right to information to the overall formation of the labor relations system contemplated by PERA. The problem is that the PERB seems to place undue weight on the means by which the legislature's ends are to be achieved, to the detriment of the practical fulfillment of those ends through

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[62] *Id.*; *City of Wilmington*, 385 A.2d at 723.

[63] *City of Wilmington,* 385 A.2d at 724 (quoting *Collyer*, 192 NLRB at 837, 1971 NLRB LEXIS 123, at *32-*33).

the collective bargaining process. Call me a traditionalist, but statutory words matter to me. A § 1307(a)(5) violation involves an unlawful refusal to bargain *in good faith* over negotiable subjects.[64] The law has deemed a refusal to provide non-privileged information relevant to a union's prosecution of a grievance a violation of that provision, because the failure to furnish that information supports the contractually dispute resolution mechanism — a mechanism that the employer is bound to negotiate. But, when an employer has negotiated a specific clause governing a union's right to information in connection with grievances, it is quite odd to hold that the employer can be charged with a "refusal to bargain" if it insists that the union use that same negotiated-for clause. Instead, it is the PERB's own refusal to defer to this resolution that undercuts important objectives of PERA and its sister statutes. These laws promote collective bargaining culminating in mutually acceptable contract provisions governing the employment relationship — provisions like Article 14.4.6.[65] Encouraging end-runs around such contract terms contradicts this important public purpose.[66] Indeed,

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[64] 13 Del C. § 1307(a)(5).

[65] *See* 19 Del. C. § 1313(c).

[66] "Of course, if an employer repeatedly ignores legitimate information requests and forces a union to go to the grievance well again and again, such conduct may be a factor cutting against deferral." *DSU I*, 2000 WL 33521111, at *15 n.81.

> failure to give effect to . . . a highly specific provision [like Article 14.4.6]. . . leave[s] [employers like] DSU subject to statutory adjudications *and* contractual grievance and arbitration proceedings over the same information request and therefore appears to remove any incentive for [them] to agree to a similar provision during future negotiations.[67]

The PERB's position is also fraught with other problems. As those experienced in litigation know, discovery battles often involve shades of gray. Rarely is it the case that the party resisting discovery is wrong in all respects and that the party seeking discovery is correct in all respects. The PERB's approach seems to miss the point. For example, in this case the AAUP made an "all files, all documents" request for all information in connection with all successful applicants for merit compensation in 1993-94. That was quite an expansive request. The AAUP then broadened its request to ask for another full year's worth of information. This request, the arbitrator denied. As a result, is it the case that DSU violated § 1307(a)(5) by refusing to produce (without an order) the documents for 1993-94? And that the AAUP violated § 1307(a)(5) by demanding that DSU fulfill a burdensome request for irrelevant documents? By pointing this out, I am not suggesting that the PERB was asked to decide this question. Instead, I raise it to point out that a refusal to produce evidence before a neutral decision-maker makes a determination of the scope and conditions on production is

[67] *Id.* at *15.

not necessarily an act of bad faith. A *per se* rule against refusal would, to be balanced, have to be coupled with a *per se* rule against improper requests.

In my prior opinion, I also noted another consequence of the PERB's opinion, which it seems to have wholly ignored. In that opinion, I held that if the PERB decided not to defer, it must consider anew the DSU's contention that it had legitimate, good faith reasons to resist the AAUP's request.[68] In particular, I noted that the DSU seemed to raise colorable arguments that the unrestricted production of the information requested could undermine the integrity of the Merit Compensation Program. To the extent that the PERB wished to hold that the DSU was guilty of a ULP, it could not avoid a more searching inquiry into the reasons why DSU had not produced the requested information. In this regard, I observed:

> Under labor statutes like PERA, the right to information is an instrumental one that serves the larger statutory goal of effective collective bargaining. Thus PERA does not give public employees and their representatives free rein to subject public employers to overly burdensome, irrelevant, or intrusive documents requests; the statute provides access to information necessary for the bargaining representative to fulfill its statutory responsibilities. *See, e.g.*, *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *23 (relevant and non-privileged information material to this purpose is statutorily due the union); *Safeway Stores, Inc. v. National Labor Relations Board*, 691 F.2d 953, 956 (10th Cir. 1982) ("Even when the information is objectively relevant, however, a union's request may be denied if its compilation would be unduly burdensome . . . .").

[68] *DSU I*, 2000 WL 33521111, at *16.

> As a result, the statutory informational right necessarily raises the same sort of balance concerns that arise in discovery disputes in litigation. The fact that a public employer resists a request for information that is later ordered produced by an arbitrator, for example, hardly compels the conclusion that the employer was not acting in "good faith," to borrow the language of §1307(a)(5). In determining whether it should stay its hand, the PERB might be expected to distinguish between a good faith dispute about the scope of information that should be produced and a bad faith refusal to provide clearly relevant, non-privileged information that in a litigation context would justify a sanction.[69]

Thereafter, I held that the PERB must confront the confidentiality and burden arguments raised by DSU, if the PERB decided not to defer.[70] In support of that decision, I articulated the ways in which the PERB's previous treatment of those arguments was unsupported by the record evidence. Nonetheless, on remand the PERB ignored this part of its responsibility, and simply reinstated its previous ULP finding without a considering the pertinent factors addressed in this court's prior opinion. As a result, its ULP finding must be overturned because of the PERB's failure to consider these important issues, which bear on the question of whether DSU's refusal was not in good faith.

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[69] *Id.*

[70] *Id.* at *17.

III. Conclusion and Final Order

For the foregoing reasons, I conclude that the PERB erred as a matter of law by refusing to defer to the resolution of this dispute by the arbitrator, and by requiring the AAUP to make use of the specific provision of the CBA that governed DSU's obligation to produced grievance-relevant information. Furthermore, the PERB erred by ignoring important factors bearing on whether DSU's refusal to produce the requested information was not in good faith. For those reasons, the PERB's ULP order is vacated and the AAUP's ULP charge is dismissed. IT IS SO ORDERED.[71]

[71] This is the final order and judgment in this matter.